Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JOHN F. MURPHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States of America has, pursuant to 28 U.S.C. § 1346(a) and 26 U.S.C. §§ 6532 and 7422, waived its sovereign immunity and Petitioner is entitled to bring suit to recover the value of land seized and held by the Internal Revenue Service for more than eleven years but not credited to the liability of the taxpayer.

2. Whether in this case the United States of America is also amenable to suit pursuant to 28 U.S.C. § 1346(a) and 26 U.S.C. § 7433 for Internal Revenue Service's reckless or intentional disregard of the Internal Revenue Code in connection with the collection of federal taxes.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals were the United States of America and John F. Murphy.

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OPINIONS BELOW

The United States District Court for the District of Massachusetts decided in favor of the United States of America without opinion on December 28, 1993, in case No. 93-10518H, captioned *John F. Murphy v. United States of America.* Jurisdiction was based upon 28 U.S.C. § 1346(a)(1).

The United States Court of Appeals for the First Circuit affirmed the judgment of the district court by Opinion dated January 25, 1995 and reprinted in the Appendix at A-2. The United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was issued by the United States Court of Appeals for the First Circuit on January 25, 1995. This Court has jurisdiction to review the judgment of the United States Court of Appeals in this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(i) United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ii) 26 U.S.C. § 7422 [1986 Code] (a):

Civil Actions for Refund

Section 7422 [1986 Code] (a) No Suit Prior To Filing Claim for Refund–No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected or of any penalty claimed to have been collected without authority or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(iii) 26 U.S.C.§ 6532 [1986 Code] (a) (1):

Periods of Limitation on Suits
Sec. 6532 [1986 Code] (a) Suits by Taxpayers for Refund

(1) General Rule - No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty or other sum,

shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(iv) 26 U.S.C. § 6511 [1986 Code] (a):

Limitations on Credit or Refund

Section 6511 [1986 Code] (a) Period of Limitation on Filing Claim - Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(v) 26 U.S.C. § 6335.

Sale of seized property

(a) Notice of seizure.—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.—The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the

time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.—If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.—The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(vi) 26 U.S.C. § 7433:

Unauthorized Collection Actions

Section 7433 [1986 Code] (a) In General — If, in the connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against

the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages – In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $100,000 or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employer, and

(2) the costs of the action.

(c) Payment Authority – Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of Title 31, United States Code.

(d) Limitations

(1) Requirement that Administrative Remedies be Exhausted – A Judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies availed to such plaintiff within the Internal Revenue Service.

(2) Mitigation of Damages – The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for Bringing Action – Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount of controversy and may be brought only within 2 years after the date the right of actions accrues.

STATEMENT OF THE CASE

Petitioner, John F. Murphy ("Murphy"), brought this action to recover certain taxes, penalties and interest paid by him in 1990 allegedly collected by the Internal Revenue Service ("IRS") in violation of 26 U.S.C. §§ 6532, 7422 and 7433. Specifically, Murphy alleges that the IRS failed to give proper credit for the value of a parcel of land the IRS had seized in 1974 ("the Property") and that the IRS has, in its dealings with Murphy, recklessly and intentionally disregarded applicable provisions of the Internal Revenue Code ("the Code") in violation of 26 U.S.C. § 7433.

Murphy was a partner in a construction company known as Capeway Construction Company ("the Company") which went out of business at the end of 1972. At the time of the Company's dissolution, there was an outstanding payroll tax liability of $9,442.13. When the Company ceased doing business in 1972, the Company's only remaining asset was a parcel of real estate consisting of .69 acres of land in the Town of Easton, Massachusetts. In January of 1974, the IRS determined that the defunct Company's outstanding payroll tax liability amounted to

$13,994.09. The Company's partners, Murphy and Edward Laffey ("Laffey") were subsequently deemed to be "responsible parties" and the defunct Company's tax liability was assessed against the partners in their individual capacities. Shortly thereafter, Laffey was released from his obligation as a responsible party on the grounds of inability to pay and Murphy was notified that he would be held solely responsible for the tax due. On April 27, 1974, the IRS seized the parcel of land and advised Murphy that the Property would be sold and the proceeds of the sale applied to his outstanding tax liability.

On August 21, 1974, the IRS brought suit against Murphy in the district court for the outstanding tax liability plus interest and statutory additions. On July 25, 1977, a judgment was entered for the IRS in the amount of $19,771.22. In this judgment, the district judge ordered the previously seized real estate be foreclosed and that it be sold at public auction ("the Order to Sell") to satisfy the unpaid payroll tax liability. Apparently, the IRS claims to have made some attempt to sell the real estate on two separate occasions during September and December of 1977 but the record is silent on this point and the case dismissed prior to discovery being conducted. There was, however, no sale of the real estate which remained subject to the IRS's Notice of Seizure.

During the next eight years, no further attempt was ever made by the IRS to consummate a sale of the real estate. The IRS never sought relief from nor modification of the district court's order to sell the Property. On August 8, 1985, after the IRS had failed to pay property taxes, which had accrued during the eleven year period it had maintained possession and control of the land, the Town of Easton obtained a final decree in the Land Court for the Commonwealth of Massachusetts whereby the Town of Easton foreclosed upon a real estate tax lien, which it had filed subsequent to the filing of the IRS tax lien in 1974. The IRS then voluntarily released its lien on the Property without notifying

Murphy and permitted the Town of Easton to take the Property for approximately $2,700 in unpaid real estate taxes. The value of the land in 1985 was approximately $60,000.

If the IRS had complied with the district court's Order to Sell and auctioned the Property at any time before the Town of Easton foreclosed upon its subsequently filed real estate tax lien, a substantial portion, if not all, of Murphy's tax liability would have been extinguished. Furthermore, the IRS never sought modification of nor relief from the order of the district court and, therefore, when it voluntarily released its lien on the real estate without notifying Murphy it jeopardized Murphy's interest in the real estate and caused Murphy substantial economic harm.

On July 16, 1990, five years after the IRS permitted the land to be taken by the Town of Easton, the IRS suddenly resumed its efforts to collect the unpaid payroll taxes from Murphy. The IRS issued a Final Notice of Tax Due to Murphy for the unpaid 1972 payroll tax liability. The notice computed the total liability at $43,468.98. On July 16, 1990, the IRS issued Murphy a second Final Notice of Tax Due ("the Second Final Notice") for $19,311.97. The IRS offered no explanation for the reduction in its calculation of Murphy's obligation from the time of its First Final Notice to that of its Second Final Notice. On August 20, 1990, Murphy paid the IRS $19,311.97 in full satisfaction of the payroll tax obligation. On September 5, 1990, Murphy timely filed with the IRS an application for refund of interest and penalties. On March 5, 1992, the IRS issued a Notice of Disallowance in connection with Murphy's claim for refund. On March 9, 1993, Murphy commenced this action for recovery of the taxes, penalties and interest paid by him pursuant to his obligations as responsible party. After the commencement of this action, the IRS continued to pursue collection efforts against Murphy seizing Murphy's 1992 federal income tax refund in the amount of $4,617 on April 26, 1993. On March 30, 1994, the IRS

notified Murphy that his remaining obligation stood at $26,109.80. Later, during oral argument before the Court of Appeals, the IRS, through its legal counsel, notified Murphy that it did not intend to pursue further collection activities and subsequently issued Murphy two identical refund checks in the amount of $238.58. Murphy contends that if he were permitted to proceed with this action, discovery will disclose that the IRS has received (or seized) over $85,000 in cash and property to satisfy a $19,771 tax obligation.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIRST CIRCUIT VIOLATES THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION AND IS IN CONFLICT WITH DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS WHICH HAVE HELD THAT A TAXPAYER IS ENTITLED TO CREDIT FOR THE VALUE OF REAL ESTATE SEIZED BY THE IRS.

In holding that the district court lacked subject matter jurisdiction in that the United States had not waived its sovereign immunity in this refund action, the First Circuit's decision effectively permits the IRS to collect and seize money and property in excess of the amount owed by a taxpayer. Under 26 U.S.C. §§ 6532 and 7422 of the Internal Revenue Code, the government has provided a limited waiver of its immunity in those cases where the taxpayer has first complied with certain well delineated filing requirements. These filing requirements, taken together, preclude a taxpayer from bringing suit until he has: (1) paid the assessed tax; (2) filed a timely claim for refund with the Secretary of the IRS; and, (3) filed the refund suit within the appropriate period of limitations. *Krienke v. IRS*, 91-2 USTC ¶50,311 (W.D.N.Y. 1991).

There is no dispute that Murphy has complied with all of the statutory prerequisites to the filing of this refund suit. Murphy paid the assessed tax; filed a timely claim with the IRS for a refund which was disallowed; and, commenced his refund action in the district court within the allowable period of time. Moreover, there is no dispute that the district court has original jurisdiction in actions for the recovery of taxes wrongfully collected under 28 U.S.C. § 1346(a). Rather, the sole basis for the decision of the Court of Appeals is that the IRS's seizure of Murphy's land in 1974 and subsequent voluntary release of its lien in 1985, without notice, to permit the land to be taken by the Town of Easton for unpaid real estate taxes which had accrued during the IRS's eleven year custody of the land, did not constitute a taking and, thus, there was no erroneous or illegal collection of taxes supporting jurisdiction. Such a holding is in direct conflict with decisions of the Fourth and Seventh Circuits which have held in similar circumstances that the seizure of land was tantamount to a taking that would violate the Takings Clause of the Fifth Amendment to the United States Constitution unless the taxpayer received proper credit for the property seized. This appeal is, therefore, singularly appropriate for review upon certiorari.

The decision of the First Circuit would permit the IRS to disregard its own regulations, ignore the order of the district court and to collect over $85,000 in cash and property to satisfy a $19,771 tax obligation. This injustice is all the more disturbing because the decision of the First Circuit in the instant case is at variance with the holdings of the Seventh Circuit in the case of *United States v. Pittman*, 449 F.2d 623 (7th Cir. 1971) and the Fourth Circuit in *United States v. Barlow's, Inc.*, 767 F.2d 1098 (4th Cir. 1985). The review of this appeal pursuant to a writ of certiorari would serve to resolve this apparent conflict and correct the resulting glaring injustice.

A. *United States v. Pittman*

In the case of *United States v. Pittman, supra,* the Seventh Circuit held that a taxpayer was entitled to credit for property seized where, as here, the IRS did not sell the property but exercised control and dominion over the seized land. In *Pittman,* the IRS levied upon a parcel of real property held by the taxpayer's nominee. *Id.* at 628. In response to the levy, the nominee conveyed the property to the IRS by quitclaim deed. *Ibid.* The IRS in turn, collected rents from tenants which it credited to the liability of the taxpayer. *Id.* at 626. During the time that the IRS held and managed the property in *Pittman,* the property was allowed to deteriorate. Some fifteen months after the IRS had seized the property, the IRS advised the taxpayer that it considered him to be the equitable owner of the property and recommended that he take whatever action he deemed appropriate to maintain the value of the property. *Ibid.* Only the amounts of rent actually collected by the IRS were ever credited to the taxpayer.

Based upon these facts, the taxpayer argued that the IRS had levied and seized his property and was thus obligated to sell it and apply the proceeds to satisfy his tax liability. The Fourth Circuit agreed concluding that because the IRS failed to properly dispose of the seized property, the taxpayer must be given proper credit for the seizure or the seizure would violate the Takings Clause of the Fifth Amendment to the United States Constitution. *Id.* at 626, citing this Court's holding in *Springer v. United States*, 102 U.S. 586, 593-594 (1880). The taxpayer was thus entitled to a credit for the value of the real estate "as of the time that the property should have been sold" by the IRS following its seizure. *Id.* at 628.

The facts of this case are clearly analogous to *Pittman*. First, the IRS seized Murphy's property to satisfy a tax lien. The IRS

then went well beyond its Notice of Seizure when it brought suit against Murphy to foreclose upon its tax lien in this matter. The IRS did, in fact, foreclose upon its tax lien and the judgment issued by the district court ordered that the property be sold at public auction. Over the next eleven years, the IRS maintained custody and possession of the land but the property was never sold as required by the Internal Revenue Code and the district court's Order to Sell.[1] The IRS never sought relief from nor modification of the order to sell of the district court. Then, the IRS exercised ultimate dominion and control over the Property when it voluntarily and without notice to Murphy released its valid lien on the property in order to permit the Town of Easton to take the land for approximately $2,700 in unpaid real estate taxes which accrued but which had not been paid by the IRS during the eleven years it had possession and custody of the land. The actions of the IRS during the eleven year period that the Property was in its possession and control — namely the release of its valid lien without notice to Murphy to permit a taking by the Town of Easton — resulted in the substantial deprivation of Murphy's rights in the Property. Accordingly, just as in *Pittman,* failure to give Murphy proper credit for the seizure violates the Takings Clause of the Fifth Amendment to the United States Constitution.

In a tacit acknowledgment of the conflict between the Seventh Circuit's holding in *Pittman* and its decision in this case, the First Circuit notes that Murphy alleges in his Complaint that the IRS exercised 'dominion and control' over the seized Property and that the conduct of the IRS led him to believe that the Government had "taken effective ownership of the Property"

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1. The IRS in *Pittman* was required to sell the seized property pursuant to 26 U.S.C. § 6335. In the instant case, the IRS arguably disregarded both the requirements of § 6335 of the Code which requires the IRS to act within 40 days from the time of giving public notice and the district court's Order to Sell the property.

but held that Murphy could not rely on the "unsubstantiated conclusion that the IRS exercised "dominion and control" (a copy of Murphy's Complaint is reproduced and submitted separately as Lodging Appendix). This argument wholly ignores the fact that the IRS's voluntarily release after more than *eleven* years of a valid lien without notice to permit a taking by the Town of Easton surely constitutes the exercise of dominion and control.[2] For eleven years, Murphy had no right to deal with the Property after the IRS seizure. Once a property has been seized by the IRS, the property is deemed to be in the possession of the IRS. A taxpayer who forcibly attempts to regain possession or causes another to do so is subject to criminal prosecution. *United States v. Afflerbach*, 754 F.2d 866 (10th Cir. 1985); 26 U.S.C. § 7212(b).

The fact that the IRS received nothing of value for the seized Property because it erred in not properly disposing of it at auction is not attributable to the taxpayer. *Pittman,* at 628. Thus, the IRS in this case should bear the burden of not properly disposing of the real estate according to statute and its failure to seek modification of or relief from the order of the district court.

B. *United States v. Barlow's Inc.*

The decision of the First Circuit in this case is also in direct

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2. The Code also supports the conclusion that the notice of seizure results in what is virtually a transfer to the government of the property which is levied. Section 6331 provides that the tax is to be "collected" by a levy which is defined as a seizure by any means. Under Section 6332(a), any person holding property levied upon is required to surrender possession of it to the government without further proceedings of any kind. If he does not, he becomes liable for the tax under Section 6332(c) while if he does, his liability to the taxpayer is extinguished under Section 6332(d). Where real property is levied upon and sold, the Government executes the deed to the purchaser and this deed conveys whatever interest the taxpayer had at the time the Government's lien attached. 26 U.S.C. §§ 6338(b) and 6339(b). Nowhere does the Code indicate that any action beyond the levy itself is necessary to place title in the Government to enable it to so convey it.

conflict with the holding of the Fourth Circuit in the case of *United States v. Barlow's, Inc., supra.* In that case, Barlow's had a fully earned account receivable which was seized by the IRS for unpaid federal taxes. Thereafter, instead of selling the account receivable as it was required to do under Internal Revenue Code § 6335, and without notifying the taxpayer, the IRS entered into an installment payment agreement with the debtor of the taxpayer who defaulted after making only a partial payment. The IRS then refused to credit the taxpayer with the full value of the seized Property claiming it had received nothing of value. The Fourth Circuit held that by failing to conduct a sale of the Property as required by the Code, the IRS had effectively precluded the taxpayer from partially satisfying its tax liability by pursing the account receivable. Citing the IRS's exercise of dominion and control over the Property and its failure to follow its own rules, the Fourth Circuit affirmed the order of the district court granting a credit against Barlow's tax liability in the full amount of the account receivable.

C. *United States v. Whiting Pools, Inc.*

In reaching its decision in this case, the First Circuit incorrectly relies upon this Court's decision in *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), which involved the limited issue of whether the IRS was required to turn property over to an estate in bankruptcy under Section 542(a) of the Bankruptcy Code. The First Circuit focused narrowly upon this Court's enunciated rule in that case that the mere seizure of property by the IRS does not effect a transfer of ownership. However, as stated above, the IRS in this case went well beyond its Notice of Seizure when it foreclosed upon its tax lien; took and maintained custody and possession of Murphy's land for more than eleven years; and then voluntarily and without notifying Murphy released its valid lien on the property in order to permit the Town of Easton to take the land for back real estate taxes

which had accrued during the period of the IRS's custodianship. Such actions precluded Murphy from exercising any right of ownership in the Property and, instead, constitute the exercise of dominion and control by the IRS over the property. Furthermore, as in *Pittman* and *Barlow's*, the IRS violated its own rules as well as the district court order to sell in failing to advertise and sell the property promptly. Moreover, the court in Barlow's took great care to note that its holding and the holding of the Seventh Circuit in Pittman were not inconsistent with this Court's ruling in *Whiting Pools*. Regarding the *Pittman* and *Whiting Pools* decisions, the court wrote:

> As in *Pittman,* the government in the case at bar exercised dominion and control over the property, and precluded Barlow's from exercising its rights with respect to the property in an effort to reduce its tax liability. This holding is not inconsistent with *U.S. v. Whiting Pools,* 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed. 2d 515 (1983). The relevant portion of *Whiting Pools* holds that property that has been levied upon by the IRS is nonetheless subject to turnover into the reorganized estate of the debtor, despite the fact that the debtor filed for bankruptcy subsequent to the IRS's levy. The Court [in *Whiting Pools*] stated that the ownership of the property is transferred only when the property is sold to a bona fide "purchaser" at a tax sale. In the instant case, actual ownership of the property is not at issue. The fact that under *Whiting Pools,* Barlow's may have been the true owner of the account, at least for the purposes of reorganization, *does not preclude the result that the IRS assumed the risk* of Western's

> default when the IRS acted inconsistently with the statute, thereby increasing Barlows' risk in the property and precluding Barlows from proceeding against the account itself.

53 B.R. 986 at 989 (D.C. 1984) (emphasis supplied).

Likewise, in the instant case, ownership of the Property is not at issue. Had the IRS (1) not exercised possession and control for more than eleven years; (2) forfeited the land by releasing its valid lien; and (3) complied with its rules and the district court Order to Sell, Murphy would have realized a credit against his tax liability. As in *Pittman* and *Barlow's,* Murphy is entitled to a credit against his tax liability reflecting the value of the Property at the time it should have been sold by the IRS following its seizure. Any risk of loss with respect to the Property which occurred due to the IRS's failure to follow the statute and enforce its collection rights must be borne by the IRS, not Murphy.

II.

THE DECISION OF THE FIRST CIRCUIT IS ALSO ERRONEOUS IN THAT IT WOULD BAR PETITIONER'S ACTION UNDER SECTION 7433 SINCE THE IMPROPER COLLECTION ACTIVITIES OF THE IRS OCCURRED AFTER THE ENACTMENT OF SECTION 7433.

It would be indeed difficult to imagine a set of facts which demonstrate more disregard for the Internal Revenue Code and the rights of the individual taxpayer than the conduct of the IRS officers involved in the collection activities against Murphy in this case. Under 26 U.S.C. § 7433, a taxpayer is provided with a right of action for civil damages against the United States in the event that any officer or employer of the IRS recklessly or intentionally disregards any provision of the Internal Revenue

Code or regulations promulgated thereunder in connection with the collection of any federal tax. The conduct complained of by Murphy and that which gives rise to Petitioner's cause of action under Section 7433 here occurred on and after July 16, 1990 when the IRS resumed its illegal collection activities against Murphy.

On July 16, 1990, sixteen years after the IRS had seized Murphy's land, the IRS served Murphy with a Final Notice of Tax Due in the amount of $43,468.98. The IRS then inexplicably sent Murphy a Second Final Notice in the amount of $19,311.97. It then collected the tax (for a second time) on August 20, 1990 and disallowed Murphy's claim for a refund on September 5, 1990. Then on April 26, 1993, after Murphy had commenced this action, the IRS seized a refund due Murphy in the amount of $4,617 and on March 30, 1994 issued Murphy still another Final Notice of Tax Due in the amount of $26,109.80. This is exactly the kind of conduct by the IRS that Section 7433 was intended to address and all of these actions occurred after the effective date of Section 7433.

Section 7433 of the Code was enacted on November 10, 1988 and applies to actions by IRS officers and employees arising after December 31, 1988. *See* Technical and Miscellaneous Revenue Act of 1988, 26 U.S.C. § 7433. Civil actions under Section 7433(a) may be brought within two years after the date the right of action accrues. *Id.*, Section 7433(d)(3). In upholding the dismissal of Petitioner's Section 7433 claims, the First Circuit incorrectly states that "all of the conduct of which Murphy complains . . . occurred well before the date of enactment" of Section 7433. As stated above, however, it is the conduct of the IRS on and after July 16, 1990 when the IRS resumed its improper collection activities against Murphy which constitutes the gravamen of Murphy's Section 7433 claims. Thus, Murphy's Section 7433 claims arose after the enactment of the statute.

The decision of the First Circuit is directly at odds with the case of *Gonsalves v. United States,* 782 F. Supp. 162 (D. Me. 1992), a case directly on point, and one which the First Circuit notes with approval elsewhere in its decision. In *Gonsalves,* the court permitted a taxpayer to bring suit against the United States under Section 7433 when the levy and seizure of the taxpayer's assets took place before the enactment of Section 7433 but where the notice of disallowance of the taxpayer's claim for refund occurred after the date of enactment for Section 7433. The court wrote:

> The Court agrees with Plaintiff that Defendant's "legal notices that [Plaintiff's] claims are fully disallowed," dated January 20, 1990, begins the running of section 7433's statute of limitations. As a result, the Court finds that Plaintiff has filed his Complaint within the applicable statute of limitations under section 7433 and his claim is not time-barred.

Id. at 170. The *Gonsalves* decision is directly on point to this action. Section 7433 permits a taxpayer to bring suit in district court within two years after the date that the cause of action accrues. All of the illegal activities, the legal notices to Murphy, the collection of taxes, the denial of Murphy's refund and the illegal collection activities which took place after the commencement of this action all occurred after the enactment of Section 7433. Under *Gonsalves*, the Internal Revenue Service's wrongful denial of Murphy's claim for refund on March 5, 1992 began the limitations period for purposes of filing this suit under Section 7433. Since this action was filed well within the two year limitations period under Section 7433, it was erroneous to dismiss Murphy's action.

CONCLUSION

The Government is entitled to no more and no less than the amount of the tax assessed. To seize and collect more deprives a citizen of property without due process and constitutes no less than a taking which is violative of the Takings Clause of the Fifth Amendment to the United States Constitution. The present opinion of United States Court of Appeals for the First Circuit in this case does all this and is in conflict with the holdings of the Fourth and Seventh Circuits in *United States v. Pittman*, 449 F.2d 623 (7th Cir. 1971) and *Barlow's, Inc. v. United States*, 36 B.R. 826, 829 (Bankr. E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985). This appeal should, therefore, be reviewed to correct the present inequity and the case be remanded to the district court for discovery and trial.

Respectfully submitted,

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Dated: March 31, 1995

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1070

JOHN F. MURPHY,
Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

JUDGMENT

Entered: January 25, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the district court is affirmed.

Costs to appellee.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Lyons and Rosenberg]

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED JANUARY 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1070

JOHN F. MURPHY,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Edward F. Harrington, *U.S. District Judge*]

Before

Cyr, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

Stephen J. Lyons with whom *Klieman, Lyons, Schindler, Gross & Pabian* was on brief for appellant.

Kenneth W. Rosenberg, Attorney, Tax Division, with whom *Loretta C. Argrett*, Assistant Attorney General, *Gary R. Allen* and *Kenneth L. Greene*, Attorneys, Tax Division, Department of

Appendix B

Justice and *Donald K. Stern*, United States Attorney, were on brief for appellee.

January 25, 1995

STAHL, *Circuit Judge*. This appeal arises from the dismissal of a suit brought by plaintiff-appellant John Murphy for a tax refund and damages stemming from an alleged illegal or erroneous tax collection. Because we agree with the district court that Murphy has failed to establish a waiver of sovereign immunity, we affirm.

I.

Background

Prior to 1972, Murphy formed Capeway Construction Company ("Capeway") as a partnership with Edward Laffey. In 1972, Capeway failed to submit payroll taxes to the federal government for the quarters ending on June 30 and September 30 of that year. At the end of 1972, Capeway terminated its business, leaving an outstanding payroll tax liability of $9,442.13. Capeway's sole remaining asset at that time was a parcel of real estate located in Easton, Massachusetts, which Capeway had acquired in 1971 for approximately $5,000 ("the Property"). The Capeway Property was subject to a first mortgage in favor of Wingate and Louise Chadbourne.

In January 1974, the Internal Revenue Service ("IRS") assessed Capeway $13,994.09 for the unpaid payroll tax liability. Because Capeway failed to satisfy the obligation, the IRS looked to Murphy and Laffey who, as partners, were individually liable for the tax liability. *See* 26 U.S.C. § 6671(b).

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In April 1974, the IRS served the partners with a notice of seizure of the Property. Prior to service of the notice, two IRS officers had advised Murphy that the agency intended to sell the Property and apply the proceeds to the outstanding tax liability. In August 1974, the IRS filed an action against Murphy and Laffey in federal district court seeking judgment in the amount of the payroll tax liability. On July 25, 1977, the district court entered judgment against Murphy and Laffey in the amount of $19,711.22[1] and ordered the foreclosure and sale of the Property at public auction by the U.S. Marshal. The order specified that a minimum bid of $4,000 would be required at the auction. The order further stated that, after paying the costs of the sale, the proceeds were to be applied first to satisfy the outstanding mortgage on the Property, then to cover the costs of the United States in the action, and finally to the outstanding judgment.[2]

In 1977, the U.S. Marshal's office made two unsuccessful attempts to sell the Property. No further effort to sell the Property was ever undertaken.[3] Over the course of the next eight years, the IRS never notified Murphy that the Property had not been sold, and Murphy does not allege that he ever inquired as to the disposition of the Property. The record does not disclose what happened to the local tax bills on the property during the intervening years. We assume that the taxes were not paid, for in

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1. This amount purported to account for $13,994.09 in outstanding taxes, penalties, and interest; $6,020.53 in statutory additions; and $335.24 for the costs of the action.

2. The order, which Murphy attached to the complaint, also stated that, if any surplus remained, it should be distributed "pursuant to a further Order of the Court."

3. Subsequently, Edward Laffey was released from liability due to his inability to pay.

1985, after the IRS released its federal tax lien, the Town of Easton foreclosed on the Property pursuant to a final decree obtained in Massachusetts state court against Murphy and Laffey for their failure to pay the local real estate taxes. The IRS did not notify Murphy that it had released its federal tax lien.

In December 1989, the IRS resumed its efforts to collect the unpaid payroll taxes by issuing a final notice of tax due to Murphy for the sum of $43,468.98. On July 16, 1990, Murphy received a second final notice, which stated that the sum due was $19,311.97. On August 20, 1990, Murphy made a payment to the IRS in the amount of $19,351.74, which purported to satisfy in full his obligation as responsible party for Capeway's outstanding payroll tax liability.[4]

On September 5, 1990, Murphy filed a refund application with the IRS, claiming that the seizure of the Property and its ordered sale should have rendered proceeds adequate to satisfy his tax liability. On March 5, 1992, the IRS disallowed his application. On July 1, 1992, Murphy filed a second application for refund on which the IRS took no action. On March 9, 1993, Murphy filed this suit against the United States seeking a refund and other relief pursuant to 28 U.S.C. § 1346(a)(1) and 26 U.S.C. §§ 7430 and 7433. In his Complaint, Murphy alleged that the government had exercised "dominion and control" over the Property and had "breached its obligation to liquidate and/or dispose of the property in a reasonable manner." The district court dismissed the suit on motion of the United States for lack of subject matter jurisdiction. This appeal followed.

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4. Though it is not entirely clear from the record, Murphy's counsel at oral argument stated that both parties agreed that this payment did in fact fully satisfy Murphy's obligation for the 1972 payroll taxes. Government's counsel did not dispute this statement.

Appendix B

II.

Discussion

Murphy contends that the district court erred in dismissing his suit for lack of subject matter jurisdiction. He claims that jurisdiction obtained under 28 U.S.C. § 1346(a)(1) for a refund of erroneously collected taxes and under 26 U.S.C. § 7433 for damages. We first outline the doctrine of sovereign immunity and the requisite standard of review, and then proceed to discuss each argument in turn.

It is well settled that the United States, as sovereign, may not be sued without its consent. *E.g., United States v. Dalm*, 494 U.S. 596, 608 (1990). Jurisdiction must be found in an express Congressional waiver of immunity or consent to be sued. *See, e.g., United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Sibley v. Ball*, 924 F.2d 25, 28 (lst Cir. 1991). In general, statutes waiving sovereign immunity should be strictly construed in favor of the United States. *See United States v. Michel*, 282 U.S. 656, 659-60 (1931); *Gonsalves v. IRS*, 975 F.2d 13, 15 (lst Cir. 1992) (per curiam); *Schon v. United States*, 759 F.2d 614, 617 (7th Cir. 1985). *See also* Charles A. Wright et al. 14 *Federal Practice and Procedure* § 3654 at 194-95 (2d ed. 1985). "Courts may not 'enlarge . . . beyond what the language [of the statute creating the waiver] requires.' " *Gonsalves*, 975 F.2d at 16 (alterations in original) (quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)).

We review *de novo* a district court's dismissal for lack of subject matter jurisdiction under Fed R. Civ. P. 12(b)(1). *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27 (lst Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3477 (December 8, 1994)

(No. 94-1019). Our review is similar to that accorded a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Negron-Gaztambide*, 35 F.3d at 27. In reviewing the dismissal, we construe the Complaint liberally and treat all well-pleaded facts as true, according the plaintiff the benefit of all reasonable inferences. *See, e.g., K.W. Thompson Tool Co. v. United States*, 836 F.2d 721, 726 (lst Cir. 1988). A plaintiff, however, may not rest merely on "unsupported conclusions or interpretations of law." *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (lst Cir. 1993). "[S]ubjective characterizations or conclusory descriptions of a general scenario which *could* be dominated by unpleaded facts" will not defeat a motion to dismiss. *Coyne v. City of Somerville*, 972 F.2d 440, 444 (1st Cir. 1992) (internal quotations omitted). Finally, we conduct our review "mindful that the party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Taber Partners, I v. Merit Builders, Inc.*, 987 F.2d 57, 60 (lst Cir.), *cert. denied*, 114 S. Ct. 82 (1993).

A. The 28 U.S.C. § 1346(a)(1) Claim.

Murphy first contends that the district court erred because jurisdiction lies under 28 U.S.C. § 1346(a)(1), which waives sovereign immunity for tax-refund suits.[5] Murphy does not

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5. 28 U.S.C. § 1346 provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for

(Cont'd)

dispute his obligation for the outstanding payroll taxes or the amount of that obligation. Neither does Murphy contend that the government obtained anything of value as a result of its dealings with the Property. Essentially, he argues that, by virtue of the notice of seizure, the ensuing court order of foreclosure and the failure of the IRS to keep Murphy informed, the IRS took effective ownership of the Property without according him proper credit for its value. In other words, the actions of the government amounted to a de facto (and erroneous) collection of the Property entitling Murphy to a refund. We disagree.

Assuming *arguendo* that, under certain circumstances, the conduct of the IRS with respect to a seizure of property could constitute a de facto collection of owed taxes, Murphy does not allege facts sufficient to support such a claim. First of all, Murphy's Complaint asserts only that the IRS issued a notice of seizure, subsequently obtained an order of foreclosure from the district court, and failed to keep Murphy informed. The Supreme Court, however, has held that the IRS's seizure of property does not effect a transfer of ownership. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209-11 (1983) (bankruptcy action). "Ownership of the [seized] property is transferred only when the property is sold to a bona fide purchaser at a tax sale." *Id.* at 211. Therefore, prior to a successful auction, the ownership of the Property remained with Capeway.

(Cont'd)

> the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Moreover, Murphy's assertion that the IRS failed to notify him that the auctions were unsuccessful can give him no comfort. The district court's order directing the U.S. Marshal's office to sell the Property explicitly stated that a minimum bid of $4,000 was required. This clearly put Murphy on notice of the possibility that the ordered auction might not be successful.

Finally, though Murphy's Complaint states that the IRS exercised "dominion and control" over the Property subsequent to the two unsuccessful auction attempts, it alleges no facts in support of the conclusory statement. Murphy has not alleged conduct analogous to taking title, insuring and renting the property, *see United States v. Pittman*, 449 F.2d 623, 627 (7th Cir. 1971), or negotiating a payment agreement directly with debtors on account receivables, *see Barlow's. Inc. v. United States*, 36 B.R. 826, 829 (Bankr. E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985).[6] Though essentially asserting that the conduct of the IRS was sufficient to cause him to believe that the IRS had taken effective ownership of the Property, Murphy pleads no facts to illustrate what that conduct was. Murphy's claim cannot rest solely on the unsubstantiated conclusion that the IRS exercised "dominion and control."

Therefore, because Murphy's Complaint cannot be

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6. In contrasting Murphy's allegations to the facts of *Pittman* and *Barlow's*, we do not hold that the conduct found in those cases would necessarily support jurisdiction for a refund suit under 28 U.S.C. § 1346(a)(1). We cite them only to illustrate the point that Murphy has alleged no facts that support his claim that the IRS exercised "dominion and control" over the Property. Furthermore, the cases are distinguishable in that neither arose as a refund suit by a taxpayer. *See Pittman*, 449 F.2d at 624 (action to foreclose federal tax liens brought by the United States) *and Barlow's*, 36 B.R. at 826 (motion in bankruptcy action to reduce tax lien subsequent to the IRS's filing of a proof of claim).

construed as asserting a claim for erroneous or illegal collection of taxes (as the IRS did not "collect" the Property), Murphy's claim cannot be considered a tax refund suit. Accordingly, no jurisdiction exists under 28 U.S.C. § 1346(a)(1). *See Cleveland Chair Co. v. United States*, 526 F.2d 497, 498-99 (6th Cir. 1975) (no jurisdiction in refund suit where dispute centers on non-action of a federal official in his capacity as a custodian and not on overpayment of taxes); *Film Truck Serv. v. Nixon*, 216 F. Supp. 77, 78 (E.D. Mich. 1963) (no jurisdiction in refund suit where Complaint alleges government failed to dispose of seized property in most productive way possible).

B. The 26 U.S.C. § 7433 Claim.

Murphy's claim for relief under 26 U.S.C. § 7433 is equally unavailing.[7] Congress enacted § 7433 "to give taxpayers 'a specific right to bring an action against the Government for damages sustained due to unreasonable actions taken by an IRS employee.' " *Gonsalves*, 975 F.2d at 15 (quoting H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 228 (1988)). Congress provided, however, that the statute should apply to actions occurring after

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7. 26 U.S.C. § 7433 provides in relevant part:

> (a) **In general** - If, in connection with any collection of Federal Tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

the date of enactment, which was November 10, 1988. *Id.* at 17-18. Because all of the conduct of which Murphy complains (i.e., seizure and failure to sell the Property, failure to notify Murphy that the auctions were unsuccessful, and release of tax lien without notice to Murphy) occurred well before the date of enactment, 26 U.S.C. § 7433 does not provide jurisdiction for Murphy's claims.

III.

Conclusion

For the foregoing reasons, the district court's dismissal is affirmed. Costs to appellees.

APPENDIX C —OTHER RELEVANT DOCUMENTS

(Omitted Here But Submitted Separately As Lodging Appendix)

Supreme Court, U.S.
FILED
MAY 26 1995
OFFICE OF THE CLERK

No. 94-1769

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN F. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, the United States has waived its sovereign immunity to petitioner's suit under 28 U.S.C. 1346(a)(1) or 26 U.S.C. 7433.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 45 F.3d 520. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1995 (Pet. App. 1a). The petition for a writ of certiorari was filed on April 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1972, petitioner and Edward Laffey formed a partnership known as Capeway Construction Company. Capeway failed to pay federal payroll taxes for the second and third quarters of 1972. At the end of 1972, when the partnership ceased doing business, its unpaid payroll tax liability was $9,442. The partnership's sole asset was a parcel of real estate located in Easton, Massachusetts, that had been acquired in 1971 for approximately $5,000. The property was subject to a mortgage (Pet. App. 3a).

In January 1974, the Internal Revenue Service made an assessment against the partnership for unpaid payroll taxes in the amount of $13,994. When the partnership failed to satisfy its obligation, the IRS looked to petitioner and Laffey who, as partners, were individually liable for the taxes (Pet. App. 3a). See 26 U.S.C. 6671(b).

In April 1974, the IRS served the partners with a notice of seizure of the Easton property. In August 1974, the IRS filed an action against petitioner and Laffey in federal district court to reduce the payroll tax liability to judgment. In July 1977, the district court entered judgment of $19,711 against petitioner and Laffey for the outstanding taxes, penalties, interest and costs. The court further ordered foreclosure and sale of the Easton property at a public auction to be conducted by the U.S. Marshal. The order specified that a minimum bid of $4,000 would be required at the auction and that, after paying the costs of the sale, the proceeds were to be applied first to satisfy the outstanding mortgage on the property, then to cover the costs of the United States in the

action and then to the outstanding tax judgment (Pet. App. 4a).

2. The U.S. Marshal made two unsuccessful attempts to sell the property in 1977. Over the next eight years, petitioner made no inquiries regarding the disposition or status of the property. In 1985, the Town of Easton foreclosed on the property pursuant to a final decree obtained in Massachusetts state court for failure to pay local real estate taxes (Pet. App. 4a-5a).

In December 1989, the IRS resumed its efforts to collect the judgment arising from the unpaid payroll taxes by issuing a notice of tax due to petitioner. The IRS sent another notice to petitioner in July 1990. In August 1990, petitioner made a payment to the IRS in the amount of $19,351. As a result of that payment, and other payments that were later applied, the judgment was satisfied in full (Pet. App. 5a).

3. In September 1990, petitioner filed a refund claim with the IRS, asserting that the seizure of the property and its ordered sale should have yielded proceeds adequate to satisfy the payroll tax liability. In March 1992, the IRS disallowed the claim. Petitioner thereafter filed this suit against the United States seeking a refund and damages for unauthorized collection actions pursuant to 28 U.S.C. 1346(a)(1) and 26 U.S.C. 7433. In the complaint, petitioner alleged that the government had exercised "dominion and control" over the property, had "breached its obligation to liquidate and/or dispose of the property in a reasonable manner" and had failed to keep him informed regarding the status of the property. The district court dismissed the suit for lack of subject matter jurisdiction (Pet. App. 5a).

4. The court of appeals affirmed (Pet. App. 2a-11a). The court noted that *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 209-211 (1983), held that ownership of seized property is not transferred until the property is sold to a bona fide purchaser at a tax sale. The ownership of the property thus remained with Capeway until the foreclosure by the Town of Easton (Pet. App. 8a). The court observed that petitioner's allegation that the IRS failed to keep him advised of the status of the property was not relevant because petitioner was put on notice by the minimum bid provision in the foreclosure order that the auction might not be successful (*id.* at 9a).

The court also noted that petitioner had not alleged facts to support his claim that the IRS exercised "dominion and control" over the property (Pet. App. 9a). The court explained that "Murphy has not alleged conduct analogous to taking title, insuring and renting the property, *see United States v. Pittman*, 449 F.2d 623, 627 (7th Cir. 1971), or negotiating a payment agreement directly with debtors on account receivables, *see Barlow's, Inc. v. United States*, 36 B.R. 826, 829 (Bankr. E.D. Va.), *aff'd*, 53 B.R. 986 (E.D. Va. 1984), *aff'd*, 767 F.2d 1098 (4th Cir. 1985)" (Pet. App. 9a). The court noted, moreover, that the latter cases did not consider or address whether a trial court would have jurisdiction over such claims in a tax refund suit (*id.* at 9a n.6). The court concluded that, "because Murphy's Complaint cannot be construed as asserting a claim for erroneous or illegal collection of taxes (as the IRS did not 'collect' the Property), Murphy's claim cannot be considered a tax refund suit. Accordingly, no jurisdiction exists under 28 U.S.C. § 1346(a)(1)" (Pet. App. 9a-10a).

The court of appeals also held that 26 U.S.C. 7433, which provides a cause of action against the United States in various tax collection circumstances, does not confer jurisdiction for petitioner's claim. The court noted that 26 U.S.C. 7433 applies only to actions occurring after November 10, 1988, the date of its enactment. Because the conduct of which petitioner complains occurred before that date, the court held that 26 U.S.C. 7433 is not applicable (Pet App. 10a-11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The United States may not be sued without its consent, and the terms of its consent define the court's jurisdiction. *United States* v. *Dalm*, 494 U.S. 596 (1990); *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983); *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). A waiver of sovereign immunity may not be inferred; any waiver of the government's immunity to suit must be explicit and is to be strictly construed in favor of the government. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). A party who seeks to bring suit against the United States bears the burden of demonstrating that an Act of Congress specifically authorizes the court to entertain his particular claim. *McNutt* v. *General Motors Accep-*

tance Corp., 298 U.S. 178 (1936); *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U.S. 327, 337 (1895).

Petitioner brought this case as an action for a refund of taxes under 28 U.S.C. 1346(a)(1). That statute provides jurisdiction in the district courts over (*ibid.*)

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Petitioner contends (Pet. 10-17) that the facts of this case reflect that the government erroneously or illegally "collected" petitioner's liability when it seized the partnership's real property. According to petitioner, this result follows from the Fourth Circuit's decision in *United States* v. *Barlow's, Inc.*, 767 F.2d 1098 (1985), and the Seventh Circuit's decision in *United States* v. *Pittman*, 449 F.2d 623 (1971). Petitioner asserts that the holding of the court of appeals in the present case—that the government did not collect anything as a result of its seizure of the real property or the unsuccessful efforts of the U.S. Marshal to sell the property—conflicts with the decisions in *Barlow's* and *Pittman*. That contention is not correct.

a. In *Pittman*, the IRS served a notice of levy upon the taxpayer's nominee who held title to certain rental property belonging to the taxpayer. The nominee conveyed the property to the IRS by means of a quit-claim deed. The IRS thereafter insured the property and solicited tenants. Notices of levy were

served on the tenants, informing them that they should pay their rent to the IRS. Following the levy, the property deteriorated. Fifteen months after the IRS had received and recorded the deed to the property, the IRS sent a letter to the taxpayer advising him that he was the equitable owner of the real property and should take appropriate steps to maintain the value of the property and prevent waste.

The government argued in *Pittman* that it had seized only the rental payments and had not seized the real property itself. The taxpayer claimed, however, that the IRS had seized the real property and was required to sell it and apply the proceeds to his tax liability. The court of appeals agreed with the taxpayer (449 F.2d at 627):

> Where the Government serves notice of levy, compels transfer of legal title to itself and exercises the rights of an owner to control property by insuring it, renting it and compelling payment of rent to itself and no one else, so that the taxpayer justly concludes he has no further right to deal with the property, there has been an effective levy and seizure within the meaning of 26 U.S.C. § 6331 and the taxpayer is entitled to credit for the property seized.

In the present case, unlike *Pittman*, there is no allegation that the United States obtained record title, collected rents or otherwise exercised dominion and control over the property. The decision in *Pittman* is thus plainly distinguishable on its facts. Moreover, the decision in *Pittman* rested on the premise that seizure by itself is effective to convey title to the property to the government. 449 F.2d at 627. This Court subsequently held in *United States*

v. *Whiting Pools, Inc.*, 462 U.S. at 211, that "[o]wnership of [seized] property is transferred only when the property is sold to a bona fide purchaser at a tax sale." The reasoning of the court in *Pittman*, as well as the facts of that case, are thus inapplicable to the present case.

b. In *Barlow's*, the IRS seized an account receivable and, without the taxpayer's participation or knowledge, entered into an installment payment agreement with the debtor. After paying $27,000 of the $102,544 due under the account, the debtor defaulted. In subsequent bankruptcy proceedings, the taxpayer objected to the government's claim for the uncollected tax liability, asserting that credit should have been allowed for the full amount of the account receivable. The bankruptcy and district courts agreed with the taxpayer, reasoning that the IRS's exercise of complete dominion and control over the account precluded the taxpayer from obtaining full payment of the account. "[B]ased on these unique facts," the court of appeals affirmed. 767 F.2d at 1100.

As in *Pittman*, the government's exercise of dominion and control over the seized property in *Barlow's* serves to distinguish that case from the present case.* Here, as in *Cash* v. *United States*, 961 F.2d 562,

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* As the court of appeals observed (Pet. App. 9a n.6), neither *Barlow's* nor *Pittman* was a suit for tax refund. *Barlow's* arose from a motion in a bankruptcy case challenging a tax lien (767 F.2d at 1100) and *Pittman* arose from an action brought by the United States to foreclose tax liens (449 F.2d at 624). Even if *Barlow's* and *Pittman* were not factually distingushable from the present case, those decisions do not conflict with the holding in this case that 28 U.S.C. 1346(a)(1) does not waive sovereign immunity for such relief in a tax refund case.

567-568 (5th Cir.) (seizure of receivables does not, by itself, transfer ownership to the government), cert. denied, 113 S. Ct. 492 (1992), *Barlow's* is distinguishable because the IRS did not exercise dominion and control over the taxpayer's property.

It is undisputed that the government did not actually collect anything as a result of the seizure of the property in the present case. See Pet. 14. Petitioner has thus not paid the tax twice, and there is no overpayment of tax. What petitioner seeks, in essence, is damages for an alleged breach of duty to make a prompt sale of the real property. As the court of appeals recognized (Pet. App. 10a), however, 28 U.S.C. 1346(a)(1) does not constitute a waiver of sovereign immunity for suits sounding in tort. See *Schon* v. *United States*, 759 F.2d 614, 617 (7th Cir. 1985) ("a taxpayer cannot rely on section 1346(a)(1) to bring suit alleging that the I.R.S. did not sell his assets so as to maximize the sale price and to minimize his remaining debt for unpaid taxes"); *Cleveland Chair Co.* v. *United States*, 526 F.2d 497, 498-499 (6th Cir. 1975).

2. 26 U.S.C. 7433(a) provides that a civil action for damages may be brought against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of" the Internal Revenue Code or any regulation promulgated thereunder. Section 7433 was enacted on November 10, 1988. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6241(a), 102 Stat. 3747. The enacting legislation provides that Section 7433 "shall apply to actions by officers or employees of the

Internal Revenue Service after the date of the enactment of this Act." § 6241(d), 102 Stat. 3749.

Petitioner's complaint alleged that the government's seizure of the Easton property and the subsequent attempted sales of that property by the U.S. Marshal violated Section 7433. Without regard to the merits of such claims, the allegedly offending actions took place prior to November 10, 1988. Petitioner's claims are therefore barred by the effective date provision of the statute, as the court of appeals correctly held (Pet. App. 10a-11a).

The decision in this case is not, as petitioner maintains (Pet. 19), "directly at odds" with *Gonsalves* v. *United States*, 782 F. Supp. 164 (D. Me.), aff'd, 975 F.2d 13 (1st Cir. 1992). In *Gonsalves*, as in the present case, the First Circuit held that a cause of action did not exist under Section 7433 where the action complained of (a levy) occurred prior to November 10, 1988. 975 F.2d at 16-17. Moreover, even if petitioner's assertion of an intra-circuit conflict were correct, it would not be an adequate basis for further review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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